
THE ROLE OF EXTRA-JUDICIAL BODIES IN VINDICATING REPUTATIONAL HARM

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*“The world needs a better understanding of how the media works, something it never gets from teams of lawyers squabbling behind closed doors.”*¹

I. INTRODUCTION

The freedom of the press, guaranteed by the First Amendment,² and its ability to inform and influence public opinion must be balanced against the harm that can be done if that power is wielded carelessly. Individual citizens, public officials, and corporations may seek redress for wrongs done to their reputation through the law of defamation.³ A delicate balance exists between the right of an individual to protect his reputation and the right of the press to publish.⁴

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¹ Brian Lambert, *Battered by Recent Rulings, WCCO ‘Re-Evaluating’ Minnesota News Council Role*, ST. PAUL PIONEER PRESS, June 16, 1997, at 8B. Brian Lambert is the staff broadcast critic for the newspaper.

² “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.” U.S. CONST. amend. I.

³ See generally Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

⁴ The rising role of constitutional privilege as a central element in libel litigation suggests that the balance strongly trends toward the press’ right to publish. See Randall P. Bezanson, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 226, 230 (1985).

As a practical matter, the truth or falsity of the challenged statement is no longer pertinent to the libel action. Liability, when found, is as often rested on a finding of abuse

Defamation law is complicated and at times incomprehensible for the uninitiated, leading to an enormous amount of criticism by both legislators and scholars.⁵ Most critics describe libel law as chaotic, confusing, and unclear.⁶ The chaotic nature of defamation law is primarily due to the fact that, at present, defamation involves a juxtaposition of two bodies of law: (1) the archaic state common law of libel and slander, and (2) First Amendment jurisprudence. The former is a system arising from medieval roots, while the latter was developed by the courts following the United States Supreme Court's landmark *New York Times v. Sullivan* decision in 1964.⁷ Change has not come easily to this area of the law. The system is well entrenched through familiarity and a strong defense bar. As Arthur M. Schlesinger, Jr. suggests, "Change is threatening. Innovation may seem an assault on the foundations of the universe."⁸

While recently pondering whether the law of defamation merited restatement, David A. Anderson, perhaps the nation's most renowned defamation law scholar, suggested that "the effort required to make sense of its doctrinal intricacy might be disproportionate to the benefits."⁹ Although he concluded that restating the law of defamation would yield little practical benefit, he noted that "[r]ethinking the entire subject of reputation and free speech, on the other hand, would be immensely useful."¹⁰

of privilege—another way of stating the fault-based constitutional privileges—as on a finding of falsity of the publication and of reputational injury.

Id.

⁵ *N.Y. Times v. Sullivan* developed First Amendment jurisprudence for defamation law and is considered the seminal case by experts. See *infra* note 9. Harsh critics of *Sullivan* abound. See, e.g. David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047 (2006) [hereinafter *Rethinking Defamation*]; David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991) [hereinafter *Libel Law*]. Cook and LeBel offer a more balanced viewpoint and approach; others criticize *Sullivan* within a larger division, critiquing how defamation law has evolved. See Geoffrey C. Cook, *Reconciling the First Amendment with the Individual's Reputation: The Declaratory Judgment as an Option for Libel Suits*, 93 DICK. L. REV. 265 (1989); Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657 (1987); Paul A. LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249 (1987); M. Linda Dragas, *Curing A Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113 (1995).

⁶ See, e.g. Robert M. Ackerman, *Bringing Coherence to Defamation Law through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 293 (1994). Interestingly, many criticisms of defamation law have shifted to its applicability to speech on the Internet, perhaps an acknowledgment that reform of the traditional jurisprudence remains unlikely. See, e.g., Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006); Melissa Troiano, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447 (2006).

⁷ Ackerman, *supra* note 6, at 293; *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

⁸ ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* 424 (1986).

⁹ *Rethinking Defamation*, *supra* note 5, at 1047.

¹⁰ *Id.*

This article accepts Anderson's challenge and proposes the use of state news councils as an alternative to traditional libel litigation for a more effective vindication of reputational injury. Part II examines the meaning of reputation, its role in social discourse, and why potential litigants require an alternative mechanism for addressing that injury. Part III discusses the legal framework of current libel law to better understand the need for an alternative method of recourse for those harmed by the media. Part IV explores the practical challenges for contemporary libel litigants. Part V considers whether the deficiencies in the law and the needs of litigants can be adequately addressed by various proposed reform agendas. Part VI examines the success of the Minnesota News Council and proposes a renewed consideration of state news councils to address and remedy reputational injury.

II. THE INTERSECTION OF PSYCHOLOGY OF REPUTATION AND LIBEL LAW REFORM

A. The Role of Reputation in Civil Discourse

Libel claims predicate themselves on reputational injury. Thus a foundational understanding of the meaning of reputation becomes the basis for finding an appropriate remedy for such an injury.¹¹ Although reputation is generally a valuable asset that individuals and groups cultivate in personal or professional relationships, it is difficult to quantify for legal purposes.¹² For this reason, the nature of reputation has been a point of contention among scholars and the judiciary.¹³ On one hand, reputation can be viewed as the thread connecting our social relationships; on the other hand, it can be viewed as an antiquated and outdated idea that is no longer relevant in

¹¹ Several excellent articles provide a detailed discussion of the role of reputation in defamation law and how, in turn, the failure of defamation law has impacted the appropriate remedies available to protect one's reputation. See Post, *supra* note 3; *Rethinking Defamation*, *supra* note 5; Robert Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743 (1986).

¹² See Post, *supra* note 3. "Reputation, however, is a mysterious thing." *Id.* at 692. See also Travis M. Wheeler, *Negligent Injury to Reputation: Defamation Priority and the Economic Loss Rule*, 48 ARIZ. L. REV. 1103 (2006) (discussing different avenues for recovery of reputational injury and concluding that certain circumstances justify consideration of reputational injury under a theory of negligence).

¹³ Justice White suggested that "since libel plaintiffs are very likely more interested in clearing their names than in damages, I doubt that limiting their recoveries would deter or be unfair to them." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985). See also Post, *supra* note 3; *Rethinking Defamation*, *supra* note 5; Bellah, *supra* note 11.

an increasingly mobile world.¹⁴ “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”¹⁵

The essential question is what is reputation and what role does it play in modern society? Professor Robert Bellah argues that “[r]eputation is the extension and elaboration of that recognition which lies at the basis of our social existence.”¹⁶ To Bellah, reputation is a relation among people.¹⁷ When a person is defamed and claims a loss of reputation, she argues that she has suffered a harm to and loss of relationships.¹⁸ To recover damages, in Bellah’s view, the plaintiff would have to prove those relationships were *actually* harmed, independent of the plaintiff’s perception that social relationships were damaged.¹⁹ Another view, notes Bellah, is that reputation serves as the backbone of a democratic society.²⁰ “The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society.”²¹

In contrast, David Anderson views reputation as a product of a different era. “Today most of us move from one community to another, not only geographically, but also socially and professionally. Whatever reputation we have in each of those communities may be recently acquired and shallowly based.”²²

¹⁴ See Post, *supra* note 3. Post describes three concepts of reputation: property, honor, and dignity. *Id.* at 720. The concepts “stand in ambiguous relationship to each other.” *Id.* at 720–21.

¹⁵ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Justice Stewart’s description “can fairly be characterized as an authentic contemporary expression of common law understanding of the law of defamation.” Post, *supra* note 3, at 707–08.

¹⁶ See Bellah, *supra* note 11.

¹⁷ *Id.* at 743–44. “Thus, although we think of a person as ‘having’ a reputation, reputation is not a property or possession of individuals—it is a relation between persons.” *Id.* at 743.

¹⁸ See *id.* at 743–51.

¹⁹ *Id.* at 744.

²⁰ *Id.* at 751 (“Considerations about reputation have led me to character and the linkage of character, citizenship, and free institutions. I cannot think of any subject more worthy of discussion in a democratic republic.”). Bellah also views character as an essential element of reputation. “In defending our reputation we are defending ourselves against defamation of our character. Perhaps we could even speak of a ‘character interest,’ that, like the reputation interest, would be social as well as personal.” *Id.* at 750. Cf. Nat Stern, *Creating a New Tort for Wrongful Misrepresentation of Character*, 53 U. KAN. L. REV. 81 (2004) (focusing on false light litigation to propose a new tort, wrongful misrepresentation of character, as an alternative when juries are “legitimately torn between compelling arguments for both plaintiff and defendant.”).

²¹ Post, *supra* note 3, at 711.

²² David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 777 (1984).

The treatment of defamation in the Restatement (Second) of Torts²³ bridges the gap between theory and law. The Restatement considers a communication to be defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”²⁴ These comments suggest that reputation is a social construction among members of a community.²⁵

A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them....²⁶

B. Why Reputational Injury Provokes Plaintiffs to Seek Legal Redress

The Iowa Libel Project, the most comprehensive study of libel plaintiffs completed to date, was a cross-disciplinary attempt to explain why people sued for libel and what reform could be made to remedy the harm those plaintiffs perceived.²⁷ The study concentrated more on the “why” of the process rather than specific reform proposals, but the conclusions provide an interesting perspective from which to contemplate reform.

The Iowa Libel Project studied libel plaintiffs who sued and appealed their cases.²⁸ Data was obtained from the following sources: a survey of 164 plaintiffs who sued the media for libel; an analysis of virtually all reported defamation and privacy cases decided between 1974 and 1984; a survey of sixty-one media defendants who were sued by the libel plaintiffs who were interviewed; and in-depth interviews at six Midwestern newspapers.²⁹ The study’s objective was to uncover why people sue for libel, especially when plaintiffs know that the success rate is low.³⁰

The media played a significant role in each plaintiff’s decision to sue, according to the plaintiffs interviewed in the study.³¹ Since a significant

²³ See RESTATEMENT (SECOND) OF TORTS § 559 (1977).

²⁴ *Id.*

²⁵ *See id.*

²⁶ *Id.* at cmt. e.

²⁷ *See* Bezanson, *supra* note 4, at 217. The project was conducted by Randall P. Bezanson, Professor of Law at the University of Iowa; Gilbert Cranberg, Gallup Professor of Journalism at the University of Iowa; and John Soloski, Professor of Journalism at the University of Iowa. *Id.* at 215.

²⁸ RANDALL BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 8 (1987). The study examined the financial arrangement between lawyer and client, the length of time the plaintiff lived in the community when they were defamed, the defenses used by the media, and the rate of success experienced by the plaintiffs. The study included 164 libel plaintiffs, all of whom were interviewed. *Id.*

²⁹ *Id.* at 6.

³⁰ *Id.* at 4. The Iowa Libel Project found that plaintiffs between 1974 and 1984 prevailed only 12.6% of the time in defamation cases. *Id.* at 116.

³¹ *Id.* at 29.

number of plaintiffs contact the offending media outlet before contacting an attorney, “[t]he press [is given] an opportunity to resolve the dispute before a lawyer enters the picture and before the complainant may even have given serious thought to litigation.”³² The Iowa Libel Project found that the media wasted this golden opportunity to avert litigation and instead treated the complaining citizen so poorly that the contact *prompted* litigation.³³ Moreover, the study found that most newspapers were unprepared to deal with the complaints and a general attitude of superiority and defensiveness prevailed in the newsroom.³⁴ The poor treatment of complaints by the media may be the most significant explanation for the amount of “petty” claims that ripen into lawsuits.

The study found four main reasons plaintiffs sue the media: to restore their reputation, deter further publication, win money damages, and punish the media.³⁵

Plaintiffs sue because they feel that they must do something, because they have no other alternative available to them, because suing is perceived as a form of self-help in counteracting the defamation, and because they are outraged at the indifference to their feelings expressed in the response of the publisher to their contact.³⁶

While the data supported all four motivations to sue, the study concluded that most plaintiffs were motivated by a need to restore their reputation.³⁷

The study also found that the act of filing a suit seemed to bring a feeling of victory to the plaintiff.³⁸ Other scholars agree that sometimes plaintiffs “win” simply by suing.³⁹ “Having garnered publicity through the very act of suing, plaintiffs, regardless of outcome, are able to call the defamatory statement into question, and thus win by suing.”⁴⁰

The Iowa Libel Project concluded that the “focus of libel suits [should] be falsity, not fault, and that the objective should be correcting falsity with truth, not money.”⁴¹ Accordingly, the Iowa Libel Project suggests that reform refocus attention on the issue of falsity⁴² and a return to reputation as the central issue in the tort.⁴³ It encourages litigation that focuses on the subjective state of mind, plaintiff identity, and publisher procedure, rather than attempting to remedy the real dispute.⁴⁴

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 30.

³⁵ *Id.* at 79.

³⁶ *Id.* at 213.

³⁷ *Id.*

³⁸ *Id.* at 80.

³⁹ See Ackerman, *supra* note 6, at 293.

⁴⁰ Bezanson, *supra* note 4, at 79.

⁴¹ *Id.* at 170–71.

⁴² *Id.*

⁴³ *Id.* at 171.

⁴⁴ *Id.* at 195.

III. THE DEVELOPMENT OF LIBEL LAW

A. Common Law Development of Libel

Although libel law is no longer a purely common law phenomenon, a brief examination of the common law of libel remains relevant, because it still dictates the *prima facie* case that a plaintiff must establish to prevail on a libel claim.⁴⁵ The constitutionalization of libel law added considerable complexity and shifted the competing interests at issue in litigation.⁴⁶ Any attempt to reform libel law begins at this fundamental common law level, since only the Supreme Court can rewrite the constitutional requirements it has established.

The Restatement (Second) of Torts identifies four required elements to sustain an action for defamation: a false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting at least to negligence on the part of the publisher; and either actionability of the statement irrespective of special harm done or the existence of special harm caused by the publication.⁴⁷

While these elements may seem simple on the surface, First Amendment jurisprudence complicates each one.⁴⁸ One court suggested a figurative Venn Diagram for understanding the overlapping bodies of law:

The first circle represents state defamation law and embodies the significant interest states have in providing tort remedies for injuries to reputation. The second circle, impinging on the first to varying degrees depending on language and interpretation, represents state constitutional guarantees of freedom of expression and freedom of the press. The third circle overlaps both the first and the second and embodies federal free expression and free press guarantees.⁴⁹

Predictably, such complications inherent in inextricable bodies of law create problems for litigants.

⁴⁵ However, the elements of a *prima facie* case differ depending on the identity of the plaintiff, the identity of the defendant, the character of the defamatory statement and the jurisdiction whose law applies. See RESTATEMENT (SECOND) OF TORTS, §558 (establishing *prima facie* case); § 580A (establishing *prima facie* case for public official plaintiff when controversy concerns public matter); § 580B (establishing *prima facie* case for public official plaintiff when controversy concerns private matter).

⁴⁶ Criticism of the constitutionalization of libel law remains a consistent theme over decades. *Cf.* Bezanon, *supra* note 4 and Anderson, *supra* note 5, at 1053.

⁴⁷ RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

⁴⁸ *See, e.g.*, Gertz v. Robert Welch Inc., 418 U.S. 323, 323–24 (1974) (discussing elements required for *N.Y. Times* protection against liability).

⁴⁹ *West v. Thompson Newspapers*, 872 P.2d 999, 1004 (Utah 1994).

B. Emergence of Libel Law in Constitutional Jurisprudence

In 1964, the Supreme Court constitutionalized libel law in *New York Times v. Sullivan*.⁵⁰ Prior to *Sullivan*, libel fell solely under state jurisdiction.⁵¹ At issue in the case was an advertisement in the *New York Times* that allegedly libeled L.B. Sullivan, then the Commissioner of Public Affairs for Montgomery, Alabama.⁵² The full-page advertisement included a number of inaccuracies, two of which referenced behavior of the Montgomery Police Department that Sullivan supervised.⁵³ Neither the Commission nor the Commissioner were specifically named in the advertisement. The Court held that the evidence was “constitutionally insufficient” to satisfy the actual malice requirement and to support a holding that the statements referred to Sullivan.⁵⁴

The central issues in the opinion were what standard of fault should be applied when the plaintiff is a public official, and whether a public official should ever be able to win a libel case.⁵⁵ The Court expressed concern that if the standard of fault was too low for public officials, debate on governmental conduct would be stifled.⁵⁶ The Court held that the guarantees of the First and Fourteenth Amendments require

a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁵⁷

Thus, the Court created a new standard called “actual malice,” which is distinctly different from the common law definition of “malice,” meaning “ill will.”⁵⁸ Actual malice was defined by the Court as “knowing falsity or reckless disregard for the truth.”⁵⁹ This standard is difficult for any plaintiff to prove because it involves the subjective element of intent of the author or editor.⁶⁰ To prevail, there must be some evidence that the author knew or should have known that the defamatory statement was false and thus dem-

⁵⁰ *N.Y. Times v. Sullivan*, 376 U.S. 254, 292 (1964).

⁵¹ See Kristian D. Whitten, *The Economics of Actual Malice: A Proposal For Legislative Change To The Rule of New York Times. v. Sullivan*, 32 CUMB. L. REV. 519, 522 (2002).

⁵² *Sullivan*, 376 U.S. at 256.

⁵³ *Id.* at 258–59.

⁵⁴ *Id.* at 292.

⁵⁵ *Id.* at 256.

⁵⁶ *Id.* at 291.

⁵⁷ *Id.* at 279–80.

⁵⁸ See Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1204 (2006).

⁵⁹ *Sullivan*, 376 U.S. at 279–80.

⁶⁰ *Id.* at 262–63.

onstrated a reckless disregard for the truth.⁶¹ In the years since *Sullivan*, the Court has identified three elements that may show reckless disregard for the truth: reliance on a source whose creditability is in doubt, reliance on a source whose version is unconfirmed, or the explicit ignoring of sources that may confirm the falsity of the defamatory statement.⁶²

C. Supreme Court's Subsequent Decisions Darken an Already Muddy Pot

Since 1964, the application of the actual malice standard has been expanded to include other classes of plaintiffs in addition to public officials.⁶³ Public figures, as well as some private parties, have been required to prove actual malice to recover damages.⁶⁴ The Court in *Rosenbloom v. Metromedia, Inc.* required private parties to prove actual malice if the defamatory comments pertained to an issue of public interest.⁶⁵ However, the plurality decision led to a degree of uncertainty regarding the burden of proof.

The Supreme Court retreated from the position articulated in *Rosenbloom* in *Gertz v. Welch, Inc.*⁶⁶ The plaintiff in *Gertz* was an attorney who represented a family suing the Chicago Police Department for the wrongful police shooting death of their son.⁶⁷ A magazine wrote a story about Gertz, asserting that he had a long police record, was an official of the Marxist League, and was a practicing communist.⁶⁸ Gertz sued the magazine for defaming him as a private citizen and attorney.⁶⁹ The trial court first declared Gertz a private person, then reversed itself and decided that, because an issue of public interest was involved, Gertz should be required to prove actual malice.⁷⁰ Gertz appealed and the Court of Appeals upheld the deci-

⁶¹ *Id.* at 279–80.

⁶² See Brian C. Murchison et al., *Sullivan's Paradox: The Emergence Of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 30–51 (1994).

⁶³ See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (expanding the actual malice standard to public figures). The Court has delineated two classes of public figures. An individual may achieve such fame or notoriety that he becomes a public figure for all purposes and in all contexts. More likely, an individual voluntarily inserts himself or is drawn into a specific public controversy, and thus becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions and are subject to the actual malice standard if they are defamed in the course of that public discussion. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–45 (1974); see also David Finkelson, *The Status/Conduct Continuum: Injecting Rhyme and Reason Into Contemporary Public Official Defamation Doctrine*, 84 VA. L. REV. 871, 907 (1998).

⁶⁴ See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (holding that the *New York Times'* actual malice standard applies to a civil libel action brought by a private individual).

⁶⁵ *Id.* at 43–44.

⁶⁶ *Gertz*, 418 U.S. 323 (1974).

⁶⁷ *Id.* at 325.

⁶⁸ *Id.* at 326.

⁶⁹ *Id.* at 327.

⁷⁰ *Id.* at 328–29 (holding that Gertz was “neither a public official nor a public figure” for the purpose of the defamatory statements).

sion on the basis of *Rosenbloom*.⁷¹ The Supreme Court overturned the decision, finding that Gertz was a private person who did not need to prove actual malice to recover for defamation.⁷² The Court also held that the State may not impose liability without some showing of fault.⁷³ While a state may require negligence as the lowest level of fault, individual states are free to impose a higher standard.⁷⁴ Many states even require a private citizen to prove actual malice to recover presumed or punitive damages, which has contributed to confusion in the system and a lack of success for the plaintiff.⁷⁵

IV. THE CHALLENGES FOR CONTEMPORARY LIBEL LITIGANTS

Current libel law satisfies no one's needs.⁷⁶ There is a general consensus among both plaintiffs and defendants that the system is not an effective way to resolve disputes.⁷⁷ "Plaintiffs, defendants, judges, lawyers and academicians have all criticized modern libel law; in practice it neither adequately protects First Amendment values nor provides plaintiffs with an efficient, meaningful forum for vindicating reputational damage."⁷⁸ As Professor Prosser famously declared, "[i]t must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense."⁷⁹

A. The Plaintiff Just Cannot Win

Once a plaintiff has met the burden of whatever standard of fault the particular court requires him to prove, the plaintiff must additionally demon-

⁷¹ *Id.* at 330.

⁷² *Id.* at 351–52.

⁷³ *Id.* at 347.

⁷⁴ *Id.* at 348.

⁷⁵ *Id.* at 349.

⁷⁶ See *Rethinking Defamation*, *supra* note 5, at 1049–50. See also David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 508 (2001). Logan concludes:

[T]he *New York Times/Gertz* regime has eviscerated the law of libel to the point that it now poses little serious threat to the First Amendment rights of the media, and that the image of the contemporary media, cowed by the threat of libel claims, is unsupported by the available evidence.

Id.

⁷⁷ See Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case For Enactment*, 31 WM & MARY L. REV. 25, 30–31 (1989).

⁷⁸ *Id.* at 31.

⁷⁹ W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984).

strate harm to his reputation in order to collect damages.⁸⁰ Reputation is not an easily quantifiable commodity, and thus damages are a tricky thing for a plaintiff to prove.⁸¹

The actual malice standard imposes considerable burdens of proof upon a plaintiff before he can recover any damages. The *Gertz* Court held that “the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”⁸² Although jury awards can be substantial,⁸³ a plaintiff’s opportunity to get a case before a jury is minimal.

The requirement of clear and convincing proof usually applies even at the summary judgment stage, so plaintiffs can’t get before a jury unless they can convince the judge on the basis of discovery evidence that they will be able to prove clearly and convincingly that the defendant knew the defamatory statement was probably false.⁸⁴

Some scholars argue that plaintiffs do not actually look for large damage awards, but rather file suit to vindicate their reputation.⁸⁵ “The publisher’s conduct, in the view of plaintiffs, is wrong principally because what was published was false; fault and responsibility are not at issue, but correction is.”⁸⁶ Adjudication of the actual issues of truth and falsity rarely occurs. Rather, most lawsuits focus on “fault, privileges and subjective state of mind.”⁸⁷ However, plaintiffs generally do not emerge from the legal morass of libel law satisfied with the outcome of the litigation or the process itself.

B. The Defendant Wins but at a High Cost of Time and Resources

Although libel defendants most often prevail in defamation lawsuits, there is a significant downside.⁸⁸ The cost in money and other intangible

⁸⁰ See *Gertz*, 418 U.S. 323, 349–50 (1971); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 770 (1985).

⁸¹ See *Anderson*, *supra* note 22.

⁸² *Gertz*, 418 U.S. at 349. The courts have assumed that the constitutional ban on presumed damages does not apply when actual malice is shown. See, e.g., *Babb v. Minder*, 806 F.2d 749, 758 (7th Cir. 1986); *Mittleman v. Witous*, 552 N.E.2d 973, 980 (Ill. 1989).

⁸³ *Gertz*, 418 U.S. at 349. In *Burnett v. Nat’l Enquirer*, 144 Cal.App.3d 991, 1018 (Cal. Ct. App. 1983), the jury awarded Carol Burnett \$1.3 million in punitive damages. The award was reduced to \$150,000 by the Court of Appeals of California.

⁸⁴ *Rethinking Defamation*, *supra* note 5, at 1050.

⁸⁵ BEZANSON ET AL., *supra* note 28, at 212. “The chief interest of plaintiffs lies in vindicating reputation through proof of falsity; it does not lie in obtaining damages for loss suffered, or in playing a part in modifying the general functions or processes of the press.” *Id.*

⁸⁶ *Id.* at 212.

⁸⁷ *Id.* at 213; see also *Logan*, *supra* note 76, at 503. Logan examines statistics compiled by the Libel Defense Resource Center to assess the future direction of libel litigation. *Id.* at 509.

⁸⁸ Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 419 (1991). “The

resources can be draining for a libel defendant.⁸⁹ “Vindicated or not, libel defendants often incur substantial costs. Even when no awards are actually paid, material costs most obviously include the legal fees paid, the value of the time committed, and skyrocketing insurance premiums.”⁹⁰ Although media defendants face high costs in a defamation suit, the rule of law generally favors them.⁹¹

One of the reasons that media defendants often prevail in libel suits are the myriad defenses available to them. Retraction laws in most states provide a statutory defense by requiring a plaintiff to request a retraction from the media before filing a libel suit.⁹² If the plaintiff does not request a retraction, he may be limited to special damages (if he wins his suit) or denied the right to maintain a suit at all.⁹³ If the defendant does publish a retraction or correction, it can be used as a partial or complete defense at trial, depending on the state law.⁹⁴

Although defendants most often prevail in libel suits, the cost of litigation makes even the most self-righteous defendant feel victimized. Reform has been slow, in part due to the lack of enthusiasm on the part of the media.⁹⁵ Although the current system is not ideal for libel defendants, it is a known quantity whereas most of the reform proposals threaten to subject the media to less certain victory.

vast majority of recent libel suits have ultimately failed in the courts. Most of those are dismissed by summary judgment before they go to trial.” *Id.* at 419–20.

⁸⁹ *Id.* at 420.

⁹⁰ *Id.*

⁹¹ *Id.* at 419–20.

⁹² *See, e.g.*, N.D. CENT. CODE § 32-43-03 (1996) (implementing the Uniform Correction or Clarification of Defamation Act). “A person may maintain an action for defamation only if the person has made a timely and adequate request for correction or clarification from the defendant or the defendant has made a correction or clarification.” *Id.*

⁹³ *Id.*

⁹⁴ *See, e.g.*, N.D. CENT. CODE § 32-43-05 (1996). “If a timely and sufficient correction or clarification is made, a person may recover only provable economic loss, as mitigated by the correction or clarification.” *Id.*

⁹⁵ Due to the growing issues in libel law, the Minnesota News Council attempted to create an alternative to libel litigation by creating a forum for individuals and corporations to present complaints of unfair news reporting. Other states such as Florida and Oregon have followed suit providing their own non-judicial forums to hear libel suits. The progress of such forums has been slowed through because “[m]embers of press associations in other states, including Kentucky, Wisconsin and Oregon, have voted to reject such [news] councils.” Dennis Hale, *ADR and The Minnesota News Council on Libel*, 49 DISP. RESOL. J. 77–79 (1994).

V. PROPOSED REFORM OF LIBEL LAW

Libel law clearly needs some type of significant reform if it is to serve any purpose.⁹⁶ The current system is broken, perhaps irrevocably.⁹⁷ “The actual malice rule . . . leaves vast numbers of people—perhaps most of the victims of media defamation—with no legal remedy for damage to reputation.”⁹⁸

Determining exactly what kind of reform would best benefit all parties proves a difficult challenge.⁹⁹ Yet libel law reform also offers the possibility of a tangible win-win situation. The plaintiff should be able to be made whole at little cost to the defendant, a result which protects both reputational interests and free speech rights. This section examines the different proposed reform approaches in an effort to evaluate the potential for successful reform.¹⁰⁰

Libel law was the province of the states prior to *New York Times v. Sullivan* in 1964. Thus state law enjoys a long history of dealing with the complex problems presented by libel law¹⁰¹ and state legislatures are a natural place for reform to begin. At least one scholar has suggested that, “in light of the Supreme Court’s constitutional pronouncements in *Sullivan*, state legislatures may properly enact state libel laws that take account of *New York Times*’ constitutional concern, but offer a different solution.”¹⁰² State law reform has not yet become a reality, but not for want of trying.

⁹⁶ While pondering whether or not the law of defamation merits restatement, noted scholar David Anderson notes that “[a]s a source of litigation, there is little left of the law of defamation.” *Rethinking Defamation*, *supra* note 5, at 1049. David Logan concurs, characterizing libel litigation as “very rare” compared to tort litigation generally. *See* Logan, *supra* note 76, at 519.

⁹⁷ “But as the likelihood of suing or being sued for libel and slander suits has faded, one has to assume that the importance of the law as a guide to conduct has diminished, too.” *Rethinking Defamation*, *supra* note 5, at 1052. *See also*, *Libel Law*, *supra* note 5, at 489.

⁹⁸ *Libel Law*, *supra* note 5, at 525.

⁹⁹ *See generally* Smolla & Gaertner, *supra* note 77, at 25.

¹⁰⁰ This section does not represent an exhaustive survey of all reform proposals, but provides a representative sample of proposals debated among scholars. Many reform proposals focus on very narrow aspects of the law that fall outside the purview of a news council.

¹⁰¹ However, most of the problems can be traced to the Supreme Court’s insertion of constitutional concepts into libel law in *Sullivan*, 376 U.S. 254 (1964). *See Libel Law*, *supra* note 5, at 537–38.

¹⁰² Whitten, *supra* note 51, at 522. In support of his conclusion, Whitten cites *Dickerson v. United States*. *Id.* at 523. In *Dickerson*, the Supreme Court held that although federal legislation attempting to “abrogate” the Miranda rule was unconstitutional, the “Constitution would not preclude legislative solutions that differed from the prescribed Miranda warnings but were ‘at least as effective. . . .’” (quoting *Dickerson v. United States*, 530 U.S. 428, 440 (2000)).

A. Uniform Correction or Clarification of Defamation Act

The Uniform Correction or Clarification of Defamation Act (“Uniform Correction Act”) was promulgated by the National Conference of Commissioners on Uniform State Laws in 1993.¹⁰³ The uniform law was drafted because the Conference did not find state retraction statutes an effective remedy to the reputational harm suffered by plaintiffs.¹⁰⁴ Additionally, the state retraction statutes did not provide adequate incentives to either party to seriously consider retraction as a viable alternative to a lawsuit.¹⁰⁵ “The Uniform Correction Act seeks to remedy these flaws in current law by providing strong incentives for individuals to promptly correct or clarify an alleged defamation as an alternative to costly litigation.”¹⁰⁶ The law attempts to change how parties go about settling defamation cases and it provides incentives for the early resolution of litigation on terms acceptable to both plaintiffs and defendants.¹⁰⁷

The Uniform Correction Act requires a plaintiff to request a clarification or correction within ninety days after knowledge of the defamatory publication.¹⁰⁸ The request for a retraction is not a per se requirement for maintaining a libel suit under the Uniform Correction Act.¹⁰⁹ If a plaintiff fails to meet this requirement within the ninety day window, he loses out on a substantial portion of his potential damages, but he can still pursue the case.¹¹⁰

The Uniform Correction Act also allows a publisher to significantly limit his liability for an alleged defamation by publishing a correction or clarification.¹¹¹ The Conference was hopeful that publishers would take advan-

¹⁰³ UNIF. CORRECTION OR CLARIFICATION OF DEFAMATION ACT (1994).

¹⁰⁴ *Id.* at 1 (Prefatory Note). “These [retraction] statutes have been largely ineffective because they most often apply to a narrow range of cases and they do not create sufficient incentives on both parties, the plaintiff and the defendant, to come to an agreement regarding retraction.” *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The Uniform Correction Act is actually one section of a longer proposed act that was withdrawn under a significant amount of pressure. The original act was a much longer and more complex attempt at wholesale reform.

¹⁰⁷ Ackerman, *supra* note 6, at 314. “Recognizing that a massive revision of the substantive law of libel and slander was beyond reach, the Committee produced an act designed to change the manner in which parties would go about trying and more significantly settling defamation cases.” *Id.*

¹⁰⁸ UNIF. CORRECTION OR CLARIFICATION OF DEFAMATION § 3. A person may maintain an action for defamation only if: (1) the person has made a timely and adequate request for correction or clarification from the defendant; or (2) the defendant has otherwise made a correction or clarification.” *Id.* § 3(a).

¹⁰⁹ *See id.* The Uniform Correction Act uses the term “correction or clarification” rather than the more traditional “retraction.” The new terms are more descriptive and carry fewer stigmas for the defendants than “retraction.” *Id.* at 1.

¹¹⁰ *Id.* § 3(b).

¹¹¹ *Id.* § 5. “If a timely and sufficient correction or clarification is made, a person may recover only provable economic loss, as mitigated by the correction or clarification.” *Id.*

tage of this provision given the large costs of litigation and potential for large awards of general and punitive damages. “Much grief and embarrassment to the defamed party may be avoided at little expense or trouble to the publisher through the simple measure of a correction or clarification, which can prevent a molehill of misunderstanding from turning into a mountain of litigation.”¹¹²

The last substantive provision of the Uniform Correction Act allows the publisher to offer the correction or clarification in writing and pay the defamed person’s reasonable litigation expenses incurred prior to the publication of the correction or clarification.¹¹³ Written acceptance of an offer of this type bars or terminates an action for defamation.¹¹⁴ If the plaintiff refuses to accept the offer, he may only recover provable economic loss and reasonable expenses of litigation.¹¹⁵

As with any Uniform law, the Uniform Correction Act drafters sought intact passage of the Act by all fifty states’ legislatures.¹¹⁶ In this case, the likelihood of passage was dependent on the “depth of support for it from some of the key groups most affected by it: the news media, plaintiff’s attorneys and insurers.”¹¹⁷ As predicted by scholars, the law failed widespread passage.¹¹⁸ Only North Dakota has ratified the Uniform Correction Act, which cannot be seen as wide acceptance of the legislation.¹¹⁹ A combination of a strong defense bar and the failure of states to see the Uniform Correction Act as an adequate remedy for the ills that plague libel law likely doomed wider acceptance of the legislation.¹²⁰

B. State Law Reform of Actual Malice Application

In a thorough critique of the *New York Times* “actual malice” standard, California Deputy Attorney General Kristian Whitten argues that strict application of the actual malice rule is no longer warranted.¹²¹ He proposes to reform libel law at the state level by making “any defamation plaintiff’s provable economic loss . . . recoverable without a showing of ‘actual mal-

¹¹² Ackerman, *supra* note 6, at 318.

¹¹³ UNIF. CORRECTION OR CLARIFICATION OF DEFAMATION ACT § 8(a).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Dragas, *supra* note 5, at 148.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See generally N.D. CENT. CODE § 32-43-01, et seq. (2005) North Dakota has adjudicated a few cases under this Act that have been reported. See *Fish v. Dockter*, 671 N.W.2d 819 (N.D. 2003), and *Forster v. West Dakota Veterinary Clinic*, 689 N.W.2d 366 (N.D. 2004). Extensive discussion of those decisions is unfortunately outside the scope of this paper as those cases do not impact upon the wholesale reform of libel law.

¹²⁰ Dragas, *supra* note 5, at 163.

¹²¹ Whitten, *supra* note 51, at 522.

ice,”” and further proposes that recoverable “economic losses not exceed the amount by which the media defendant actually profits from the defamatory falsehood.”¹²² Whitten concludes that such a state statute would be “consistent with the spirit and the purpose of the *New York Times* rule.”¹²³

Whitten proposes to replace the strict actual malice requirement with a more lenient standard of fault and a more restrictive approach to damages.¹²⁴ Justices Harlan and Marshall advocated this approach in their separate dissents in *Rosenbloom v. Metromedia, Inc.*¹²⁵ The concept of limiting economic recovery to the amount of benefit received by the publisher is analogous to recovery mechanisms found in trademark law.¹²⁶ Whitten suggests that this type of recovery device would have a deterrent effect and “would help insure that members of the media are not unjustly enriched at the expense of a defamation plaintiff’s reputation.”¹²⁷

Whitten’s proposed statutory reform of libel law raises an interesting question: how analogous are trademark and libel law? The closer the two bodies of law, the more sense the reform proposal makes. However, the nature of libel and the motivations provoking libel litigation differ, sometimes greatly, from trademark.¹²⁸ Trademark is an economic tort and litigants generally seek financial compensation for use of the mark.¹²⁹ On the other hand, “[d]efamation is a dignitary tort; attempting to reduce it to a remedy for economic loss would be historically unfaithful, doctrinally

¹²² *Id.* at 535–36.

¹²³ *Id.* at 536. Although Whitten asserts that his proposed change of tort law would be accepted by the Supreme Court as it serves the constitutional purposes of *Sullivan*, the issue may not be so clear cut. David Anderson suggests that the complicated pronouncements of how state law “should be modified to make it constitutional” create uncertainty. *Rethinking Defamation*, *supra* note 5, at 1056. Whether the Court’s “suggestions” represent prophylactic rules, federal common law, or constitutional principles will not be addressed “until a state adopts an alternative modification to the law of defamation and the Court has to decide whether its own pronouncements are in fact the only permissible solution.” *Id.* at 1056.

¹²⁴ Whitten, *supra* note 51, at 523–24.

¹²⁵ 403 U.S. 29, 71–86 (1971) (Harlan, Marshall, JJ., dissenting). The Court later adopted this view when it addressed the appropriate standard of fault a private person must demonstrate to recover damages. *See Gertz v. Robert Welch*, 418 U.S. 323 (1974).

¹²⁶ Whitten, *supra* note 51, at 562–63 (discussing the “strong analogies between trademark infringement and libel.”).

¹²⁷ *Id.* at 563.

¹²⁸ The Supreme Court has expressed this view consistently. *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz*, 418 U.S. 323 (1974); *Dun & Bradstreet Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985). “Given the defense of truth, [and] in order to assure that it promotes purposes consistent with First Amendment values, the legitimate function of libel law must be understood as that of compensating individuals for actual measurable harm caused by the conduct of others.” Whitten, *supra* note 51, at 560 (quoting *Rosenbloom*, 403 U.S. at 55 (Harlan, J., dissenting)).

¹²⁹ *See* 15 U.S.C. § 1117(a) (2004).

radical, and destructive of important cultural values.”¹³⁰ Removing actual malice from the libel equation represents an intriguing proposal, but it remains to be seen whether any state chooses to accept Whitten’s challenge.

C. Annenberg Reform Proposal

The Annenberg Libel Reform Proposal, released in 1988, was one of the most talked about proposals in the past thirty years.¹³¹ It proposed a comprehensive model statute with accompanying commentary,¹³² generating a great deal of attention in academic and professional circles.¹³³ The Committee that produced the proposal represented a spectrum of constituencies, which was designed to lend credence to the final product.¹³⁴

The proposal grew out of the premise that the current libel law was “costly, cumbersome, and fail[ed] to vindicate either free speech values or the protection of reputation.”¹³⁵ The Annenberg group found that there was rarely “a clear-cut resolution of what ought to be the heart of the matter: a determination of the truth of falsity of what was published.”¹³⁶ There are three primary stages to the Annenberg proposal: a forceful retraction and

¹³⁰ *Rethinking Defamation*, *supra* note 5, at 1047. Anderson’s comment was directed at the notion of restating defamation as an economic tort and does not reflect directly on Whitten’s proposed reform.

¹³¹ Smolla & Gaertner, *supra* note 77, at 26.

¹³² Ackerman, *supra* note 6, at 293–94.

¹³³ Smolla & Gaertner, *supra* note 77, at 27. “Virtually every major newspaper in the United States carried stories about the report; many publications ran editorials commenting upon it; and a virtual cottage industry of symposia and conferences sprang up in its wake to discuss it.” *Id.* at 26–7.

¹³⁴ Members included: Sandra S. Baron, then the director of NBC’s legal department; Bruce E. Fein, constitutional law scholar and former general counsel of the FCC; Judge Lois G. Forer; Samuel E. Klein, noted media defense attorney; Anthony Lewis, Pulitzer Prize winning New York Times columnist; Roslyn A. Mazer, First Amendment attorney; Chad E. Milton, press attorney for Media/Professional Insurance, one of the largest libel insurance underwriters; Anthony S. Murry, media attorney who represented General Westmoreland; Herbert Schmertz, former director and vice president for public relations of Mobile Oil; Richard M. Schmidt, Jr., media attorney and former general counsel for the United States Information Agency and Voice of America; and Rodney A. Smolla, director of the Annenberg Libel Reform Project. *Id.* at 27–30.

¹³⁵ *Id.* at 31. “Enormous defense costs of protracted litigation exert a chilling effect on the press, while plaintiffs are left with no meaningful legal remedy for reputational injury.” *Id.* at 31.

¹³⁶ *Id.* The philosophy of the Annenberg Libel Project is that “freedom of speech and the law of defamation should function in harmony to serve the compelling public interest in the discovery of the truth.” *Id.* at 32.

reply requirement,¹³⁷ a declaratory judgment provision,¹³⁸ and an action for damages similar to a traditional defamation suit.¹³⁹

1. Retraction and Reply Requirement

Under this provision, every potential plaintiff must seek either a retraction or an opportunity to reply before filing suit.¹⁴⁰ The request must be made within thirty days of publication of the defamatory statement.¹⁴¹ Failure to comply bars the plaintiff from later bringing a defamation action against the defendant.¹⁴² If the request is granted within thirty days by the would-be defendant, the plaintiff is also barred from bringing suit.¹⁴³

The retraction and reply requirements are intended to expedite the (currently) protracted process of defamation litigation. The drafters of the proposal hope that the almost immediate retraction and reply will defuse libel litigation at an early stage.¹⁴⁴ Quick intervention through retraction and reply is intended to remedy what the project members saw as deficiencies in the current process.¹⁴⁵ State retraction statutes are seen as “toothless” paper tigers that are ineffective in deterring litigation or producing meaningful retractions.¹⁴⁶

The criticism of this section was vigorous. The primary complaints were that an uneducated plaintiff may be unaware of the law and thus may inadvertently find his suit barred because he or she failed to demand a retraction or an opportunity to reply within the statutory thirty-day window.¹⁴⁷ Also, discovery of the defamatory statement may occur after the thirty-day window of opportunity has elapsed, unfairly preventing the plaintiff from pursuing a legitimate defamation claim.¹⁴⁸

¹³⁷ LIBEL REFORM ACT § 3(a) (Proposed Draft 1998), reprinted in RODNEY A. SMOLLA, 2 LAW OF DEFAMATION 9-71 (Thomson/West 2005) [hereinafter LIBEL REFORM ACT].

¹³⁸ *Id.* § 4(a).

¹³⁹ *Id.* § 6(a).

¹⁴⁰ *Id.* § 3(a).

¹⁴¹ *Id.* § 3(d).

¹⁴² *Id.*

¹⁴³ *Id.* § 3 (d).

¹⁴⁴ *Id.*

¹⁴⁵ Smolla & Gaertner, *supra* note 77, at 40.

¹⁴⁶ *Id.*

¹⁴⁷ Judge Pierre N. Leval, who presided over the libel trial between General Westmoreland and CBS, emerged as one of the Annenberg Proposal’s sharpest critics. Judge Leval was particularly dissatisfied with the retraction and reply provisions of the Proposal. See generally Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1988).

¹⁴⁸ *Id.*

2. Declaratory Judgment Provision

If the dispute is not resolved through retraction and reply, the next stage of the Annenberg Proposal allows the plaintiff to file suit against the defendant.¹⁴⁹ Either the plaintiff or the defendant may elect to try the libel suit as declaratory judgment.¹⁵⁰ If either party takes this election, the plaintiff loses the opportunity to seek monetary damages as a remedy to the defamatory statement.¹⁵¹ In addition, the defendant loses the protection of constitutional fault requirements of negligence or actual malice, which would normally apply.¹⁵² The only issue at a declaratory judgment trial is whether the statement at issue was true or false. The plaintiff bears the burden of proof. This stage of the Proposal also contains a fee shifting element that could require the loser to pay the winner's attorney fees.¹⁵³

One of the criticisms of this provision is the patent unfairness of denying the plaintiff the ability to recover any of his pecuniary damages. The problem is that no damages can be awarded under the current doctrine without a showing of fault.¹⁵⁴ So either the declaratory judgment deals with only the truth and falsity of the defamatory statement and it awards no damages whatsoever, or there is a full trial with a showing of fault to award even a minimum of damages. The drafters of the Annenberg Proposal opted to cut fault out of the process and were forced to eliminate damages at the same time.¹⁵⁵

Libel defense lawyers expressed some unease at the declaratory judgment option in the Proposal. The removal of the First Amendment safeguards that have traditionally guaranteed victory were seen as unnerving.¹⁵⁶ "Feeling safe under the present law, they (the media) are unwilling to venture into the Act's unknown legal world."¹⁵⁷ Three themes emerged in the

¹⁴⁹ This provision is only triggered when the defendant refuses to print a retraction or offer an opportunity to reply. As discussed above, if the plaintiff fails to request the retraction or reply, he cannot file suit. If the plaintiff is unsatisfied with the retraction, he is still barred from filing suit.

¹⁵⁰ LIBEL REFORM ACT, *supra* note 137, § 4(a).

¹⁵¹ *Id.* § 4 (d).

¹⁵² *Id.* § 4 (b).

¹⁵³ *Id.* § 10 (b) (stating in relevant part of commentary that while the Act contemplates that the loser will pay the winner's attorneys' fees as a matter of course, a safety valve provision allows the court to deny or reduce awards to any prevailing party who litigated "vexatious or frivolous claims or defenses.").

¹⁵⁴ See *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964); *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 349 (1974); *Dun & Bradstreet Inc. v. Greenmoss Builders*, 472 U.S. 749, 763 (1985).

¹⁵⁵ In some ways this aspect of the Annenberg Proposal was reflected in Whitten's analysis. Both proposals identify fault as an overwhelming burden to potential litigants. See Whitten, *supra* note 51, at 522.

¹⁵⁶ See Eleanor Randolph, *Study Urges Law Be Changed to Reduce Libel Litigation*, WASH. POST, Oct. 19, 1988, at A3 (attributing Henry Kaufman).

¹⁵⁷ Rodney A. Smolla, 2 *Law of Defamation* 9-71, 49 (Thompson/West 2005).

media's critique of the Proposal: "[F]irst, that the Proposal would generate an increase in frivolous litigation; second, that the Proposal places an unrealistic and anti-speech emphasis on litigation over 'truth'; and third, that the fee shifting provisions for attorneys' fees entail liability without fault in violation of the First Amendment."¹⁵⁸

3. *Traditional Suit for Damages, with a Twist*

If neither the plaintiff nor defendant elects the declaratory judgment option under Stage Two of the Annenberg Proposal, the dispute continues under Stage Three as a traditional defamatory suit, but with a couple changes.¹⁵⁹ The suit proceeds as current constitutional doctrine requires except that it establishes a floor of negligence as fault.¹⁶⁰ The most significant change is that the plaintiff can recover only for the damages he actually suffered.¹⁶¹ The proposal eliminates presumed and punitive damages.¹⁶² There is also no provision for fee shifting under this Stage.

The Annenberg Proposal generated a lot of discussion, but failed to provoke any real reform.¹⁶³ The reason may be explained by a fear by the media of significant changes contained within the Proposal. The Annenberg Proposal still remains one of the most comprehensive attempts to resolve the serious flaws within the current system.

D. Libel Law Reform Must Allow Plaintiffs to Restore Their Reputation while Protecting the Rights of a Free Press

For libel law reform to be successful, any proposal must take into account the delicate balance of preserving the plaintiff's perception of his reputation and the need of the press to protect itself against expensive and invasive litigation in exercising its freedom. The failure of most libel law reform is not that the basic ideas are unworkable, but rather that plaintiffs and media defendants have not bought into the concepts. Consumers and libel plaintiffs seek public accountability for false and harmful publications from the media. The Iowa Libel Project cited a significant percentage of plaintiffs who would have been deterred from litigation by an apology and/or a correction.¹⁶⁴ Yet newspapers seem unwilling to apologize for fear of leaving themselves open to litigation. This completely contrary ap-

¹⁵⁸ *Id.* at 50.

¹⁵⁹ LIBEL REFORM ACT, *supra* note 137, § 6(a).

¹⁶⁰ *Id.* § 7.

¹⁶¹ *Id.* § 9(b).

¹⁶² *Id.* § 9(b)-(d).

¹⁶³ *See* Bellah, *supra* note 11.

¹⁶⁴ *See* Bezanson, *supra* note 28.

proach has done nothing but employ attorneys to litigate, which is what both parties desire to avoid.

Although a compromise appears impossible, considering the failed efforts by some of the brightest legal minds in the country, one state has resurrected an old approach that is working. The next section will examine Minnesota's use of a news council to arbitrate disputes between libel parties. This solution has begun to attract a lot of attention from media groups and potential libel plaintiffs as a more efficient mechanism to resolve disputes.

VI. RESURRECTING NEWS COUNCILS

Many valiant attempts to reform libel law have never caught on in a manner that could be considered successful. Yet each of the proposals share several core values that any plausible alternative must embrace: a shift in focus from fault to truth, an emphasis on reputational injury rather than pecuniary damages, and a recognition that all parties benefit from a fair and balanced process to air grievances.

News councils offer a legitimate alternative to legislative reform. A form of alternative dispute resolution, news councils address the core values that prompt those with injured reputations to sue.¹⁶⁵ Currently, Minnesota, Washington, and Hawaii have news councils that demonstrate signs of real progress and hope for large-scale reform.¹⁶⁶ These states have embraced news councils as an effective mechanism to bypass the complexity of libel law to more efficiently resolve complaints.¹⁶⁷ The idea of a news council (local or national) is not new, but the fact that in a few states it is providing

¹⁶⁵ In the absence of news councils, other forms of alternative dispute resolution have been proposed as a means to avoid a broken system of libel law.

ADR offers libel litigants a chance to resolve their differences in a fair, timely and cost-effective manner. The disputants can select an ADR procedure that best meets their individual needs. The dispute is resolved privately out of the public spotlight, and potential further damage to each party's reputation is minimized.

See Michael E. Weinzierl, *Wisconsin's Court-Ordered ADR Law: Potential For Resolving Libel Disputes*, 1994 J. DISP. RESOL. 193, 215 (1994). See also Jonathan Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 705-11 (2000) (weighing deterrence value in proposals to substitute declaratory judgment proceedings for traditional libel litigation).

¹⁶⁶ See Minnesota News Council, <http://www.news-council.org/> (last visited Apr. 14, 2004). Information regarding Washington's New Council can be found at: Washington News Council, <http://www.wanewscouncil.org/index.html>. The Hawaii News Council runs a more informal operation and does not have a Web site. See Lori Robertson, *Press Accountability, Hawaiian Style*, 20 AM. JOURNALISM REV. 13 (1998) (With an admittedly informal operation, little funding and no actual office, the Honolulu council meets monthly to discuss ongoing issues and to throw 'kudos and darts' at the local media. *Id.* at 1).

¹⁶⁷ Wisconsin lacks a formal news council, but its judiciary has embraced alternative dispute resolution as a mechanism to resolve disputes involving reputational injury. See Weinzierl, *supra* note 165, at 193.

potential plaintiffs an opportunity to air their grievances and attain rulings of truth or falsity with little cost to either party is extraordinary. This section examines the history of news councils. It then looks at how the Minnesota News Council (“MNC”) and Washington News Council¹⁶⁸ are balancing the primary concerns of plaintiffs wronged by the media and the First Amendment rights of a free press.

A. The History and Purpose of News Councils

A news council is a quasi-legal forum where parties bring their complaints about allegedly false and defamatory news coverage. The MNC’s mission is as follows: “Promoting fair, vigorous and trusted journalism by engaging the news media and the public in examining standards of fairness.”¹⁶⁹ Supporters of news councils argue that they make the media more accountable to the public which, in turn, helps to restore the media’s credibility.¹⁷⁰ Detractors warn that news councils give unchecked power to institutions and chill free speech.¹⁷¹

A national news council operated sporadically between 1972 and 1982, but was forced to shut down due to the lack of support from major newspapers and networks.¹⁷² The push for a national news council may have

¹⁶⁸ Although three news councils currently function in the United States, this article focuses on the MNC, which has operated the longest and received significant national attention. The Washington News Council does not publish formal Determinations like Minnesota, which makes their resolutions more difficult to document. Narrative descriptions and links to some documents can be found at: Washington News Council, <http://www.wanewscouncil.org/Complaint%20Resolutions.htm> (last visited Apr. 14, 2007).

¹⁶⁹ See MNC, <http://www.news-council.org/>. Similarly, the Washington News Council’s mission is “to help maintain public trust and confidence in the print, broadcast and online news media by promoting fairness, accuracy and balance.” See also Washington News Council, <http://www.wanewscouncil.org/Archive%201999.htm> (last visited Apr. 14, 2007).

¹⁷⁰ See generally Mike Wallace, *The Press Needs a National Monitor*, WALL ST. J., Dec. 18, 1996, at A20.

¹⁷¹ See, e.g., Alexander Cockburn, *Leave the Press to the Court of Public Opinion*, L.A. TIMES, Dec. 27, 1996, at 9 (“[News councils are] a terrible idea. As noted above, most members of the public, particularly the ‘responsible’ sector, detest the press and would, if given half a chance, annul the First Amendment and shoot us all.”).

¹⁷² In part as a reaction to President Richard Nixon’s critique of media prejudice, a National News Council was formed in 1973 to fill the gap between letters-to-the-editor and costly libel suits. Persons bringing complaints to the National Council had to waive their rights to sue the accused news organizations. The Council ceased operating in 1984 because it lacked support from the major national newspapers, including the New York Times.

See generally David A. Logan, “Stunt Journalism,” *Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL’Y 151 (1998). According to Mike Wallace, two journalistic heavy hitters, New York Times Editor Abe Rosenthal and CBS News Anchor Walter Cronkite, played a significant role in the demise of the National News Council. See Wallace, *supra* note 170.

faltered, but news councils are bringing parties to the table on the local level. The success of the Minnesota and Washington News Councils may well inspire support for the revival of a national council, advocated by *60 Minutes*' Mike Wallace.¹⁷³

State news councils address complaints both large and small.¹⁷⁴ Complainants may be private citizens,¹⁷⁵ corporations,¹⁷⁶ public figures,¹⁷⁷ or public officials.¹⁷⁸ The MNC allows complaints to be filed electronically via the Internet.¹⁷⁹ In contrast, the Washington News Council provides its form online, but completed forms must be submitted by mail.¹⁸⁰ In both states, the complainant trades his right to bring a libel suit in court for the opportunity to have the dispute resolved by a group of people composed of journalists and members of the general public.¹⁸¹ The news council for-

¹⁷³ “[T]he public should have some means to bring their complaints to someone with the competence and authority to give a public ‘thumbs up’ or ‘thumbs down’ as to the accuracy and the fairness of certain troubling news reports.” Wallace, *supra* note 170. Wallace also did an extensive piece on the MNC’s handling of the dispute between WCCO and Northwest Airlines. *Id.*

¹⁷⁴ Because news council complaints often do not have an associated dollar value attached to the alleged reputational injury, assessing the “size” of the complaint can be difficult. Needless to say, some complaints are certainly higher profile than others. *See, e.g., In re Northwest Airlines against WCCO-TV*, MINN. NEWS COUNCIL DETERMINATION 112 (1996) [hereinafter *Northwest Airlines Complaint*].

¹⁷⁵ Private citizens have the lowest hurdle to prove fault, but most private complainants only desire vindication of their reputation. *See, e.g., In re Complaint of Dr. Philip Sallberg against Rosseau Times-Region*, MINN. NEWS COUNCIL DETERMINATION 127 (2000). The MNC upheld complaints of neighbors whose objections to rezoning requests were inaccurately reported in local paper. *Id.*

¹⁷⁶ *See, e.g., In re Complaint of Gold’n Plump Co. against WCCO-TV*, MINN. NEWS COUNCIL DETERMINATION 135 (2003).

¹⁷⁷ *See, e.g., In re Complaint of John Kysylyczyn against Star Tribune*, MINN. NEWS COUNCIL DETERMINATION 146 (2006) (rejecting the former Mayor’s complaint that a news story unfairly criticized him).

¹⁷⁸ Public officials and government agencies often seek resolution of complaints from news councils. *See, e.g., In re Complaint of Minnesota Dept. of Transportation against Star Tribune*, MINN. NEWS COUNCIL DETERMINATION 133 (2002) (rejecting complaint of state agency that transportation contracts awarded unethically).

¹⁷⁹ Minn. News Council, Complaint Form, <http://www.news-council.org/form.htm> (last visited Apr. 14, 2007) (providing a simple, fill in the blank form to initiate the complaint process).

¹⁸⁰ Wash. News Council, Complaint Form, http://www.wanewscouncil.org/Documents/WNC_Complaint%20Form0725.pdf (last visited Apr. 14, 2007) (requesting a party to check whether the story was inaccurate and in what way and whether or not there was an ethical lapse by the media and what kind).

¹⁸¹ The MNC’s waiver states, in part:

In consideration of the Minnesota News Council’s agreement to consider my grievance, I hereby waive any and all claims or demands that I may now have or may hereafter have, of any kind or nature, before a government agency or before a court of law, including defamation actions arising out of or pertaining to the subject matter of my grievance against any person or corporation, including persons presenting information to the Minnesota News Council, or against the Minnesota News Council, its members

wards the complaint to the offending media and encourages a dialogue between the parties, which may be mediated by news Council staff.¹⁸² If the complaint is not resolved, the Council schedules a hearing. A hearing before the MNC is a discussion about whether the publication was unfair, rather than a determination of whether it meets the legal definition of defamatory.¹⁸³ Most cases that come before the news council do not meet the legal burden established by *Sullivan* and its progeny,¹⁸⁴ but that does not mean that the complaints lack merit. For example, most of the complaints submitted to the MNC state that the publication was “inaccurate” or “left the reader with the wrong impression.”¹⁸⁵

The MNC, in continuous operation for more than thirty-five years, has successfully penetrated the legal landscape to become an accepted alternative to traditional litigation.¹⁸⁶ In 2006, even Minnesota’s Attorney General elected to file a complaint with the Council rather than initiate a lawsuit for defamation.¹⁸⁷ State Attorney General Mike Hatch, then a gubernatorial candidate, filed a detailed complaint regarding what he considered inappropriate questions from *Minneapolis Star* and *Tribune* reporters.¹⁸⁸ Ulti-

and employees for statements made during the proceedings or for the content of its decisions or reports.

Minn. News Council, Waiver of Claims, <http://www.news-council.org/Waiver%20of%20Claims.html> (last visited Feb. 20, 2007).

¹⁸² See Minn. News Council, How to File a Complaint, http://www.news-council.org/how_to_file.html#complaintform (last visited Apr. 14, 2007).

¹⁸³ See *id.* In Minnesota, news outlets inform readers how to address complaints, including the availability of the MNC. See *e.g.* Correction Policy of the St. Paul Pioneer Press, 2005 WLNR 15867519 (2005).

¹⁸⁴ The complaint form required by the MNC does not include any mention of the actual malice standard required by *Sullivan*. See Minn. News Council, Complaint Form, <http://www.news-council.org/form.htm> (last visited Apr. 14, 2007). See also *N.Y. Times v. Sullivan*, 376 U.S. 254, 283–93 (1964).

¹⁸⁵ See *e.g. In re Complaint of Gold’n Plump Co. against WCCO-TV*, MINN. NEWS COUNCIL DETERMINATION 135 (2003). Gold’n Plump complained that a story broadcast by the CBS-affiliate WCCO was “inaccurate, unbalanced and sensationalized.” *Id.* The story suggested that chicken sold by Gold’n Plump, and other similar food processors, may be dangerous because “chickens treated with antibiotics develop resistance to those drugs.” The News Council upheld all complaints. *Id.*

¹⁸⁶ The MNC has often been cited as a model for other states to consider. See, *e.g.*, Larry Fiquette, *Local News Council Is Touchy Subject*, 27 ST. LOUIS JOURNALISM REV. 7 (1996) (discussing the success of the MNC and suggesting bringing the concept to Missouri).

¹⁸⁷ See Rachel E. Stassen-Berger, *Hatch Calls Reporters’ Questions Malicious: Their Email Asked about Parking Ticket Rumors; News Council Rejects Complaint*, KNIGHT RIDDER TRIB. BUS. NEWS, July 25, 2006, at 3B. The dispute arose when reporters from the *Minneapolis Star* and *Tribune* emailed Hatch for a comment regarding the circumstances surrounding a parking ticket. *Id.* “The reporters wanted comment on rumors that the attorney general parked his car because he was meeting his daughter, who was upset about a boyfriend.” *Id.*

¹⁸⁸ See Pam Louwagie, *Hatch Faults Star Tribune in News Council Complaint*, STAR TRIB., July 25, 2006, at 1B. Hatch supplied copies of his Complaint to the press corps and the story gained a life of its own, defeating the purpose of the Complaint. “Every year we

mately, the MNC refused to consider Hatch's complaint since the offending material had not been published,¹⁸⁹ but the decision of Minnesota's top lawyer to seek redress for his reputation injury at the MNC provides irrefutable evidence that the news council provides a viable alternative to the archaic morass of libel law.

B. News Councils Achieve Core Values Identified in Libel Reform Proposals

The MNC tackles tough issues and promotes real change in a manner acceptable to the Minnesota news media. For example, in 1974, the Council sided with a private citizen who complained that the *Minneapolis Tribune* erred when it published information about ransom drop-off points while the kidnapping victim was still being held by her captors.¹⁹⁰ The *Minneapolis Tribune* later issued a policy statement saying it would publish no material that is likely to cause substantial harm to any person.¹⁹¹ In a separate case, the MNC upheld Minneapolis Police Chief John Laux's complaint in 1993 that KARE-TV crossed the line between reporting the news and making news when it chartered an airplane to fly to Chicago in order to pick up a wanted cop killer and turn him over to police on the news.¹⁹²

1. News Councils Shift the Focus from a New York Times Standard of Fault to the Truth of the Complaint and the Fairness of the Reporting

Resolution of disputes brought to the MNC requires the council to focus closely on the underlying facts of the dispute to determine whether the media coverage was accurate and fair.¹⁹³ This approach represents a stark

look into hundreds of stories that never make it into the paper. That's what this was, until it became a News Council complaint." *Id.* (quoting Star Tribune Editor Anders Gyllenhaal).

¹⁸⁹ See Dane Smith, *Hatch's Use of Resources Challenged*, STAR TRIB., July 29, 2006, at 3B. "The complaint, which alleged that the Star Tribune was crossing a boundary and asking too many questions about Hatch's personal life, will not be heard by the nonprofit organization, which acts as a watchdog over the news media. The council only accepts complaints about published material." *Id.*

¹⁹⁰ See *In re Complaint of Elizabeth Guthrie against the Minneapolis Tribune*, MINN. NEWS COUNCIL DETERMINATION 11 (1974), http://www.news-council.org/Outcomes/outcomes_det-11.html (last visited Apr. 14, 2007).

¹⁹¹ *Id.* "We should engage in no news activity that is likely to bring injury or death to a person because of our methods or actions. We need to get the news—swiftly and fully—but not irresponsibly. No news story is worth a human life." *Id.*

¹⁹² See *In re Complaint of Chief John Laux, Minneapolis Police Dept. against KARE-TV*, MINN. NEWS COUNCIL DETERMINATION 98 (1993), http://www.news-council.org/Outcomes/outcomes_det-98.html (last visited Apr. 14, 2007).

¹⁹³ Complaints to the MNC include allegations that news coverage was unfair, unbalanced, sensationalized, and inaccurate. See MNC Hearing Index Reputations, http://www.news-council.org/Outcomes/outcomes_reputation.html (last visited Apr. 14, 2007).

departure from the complicated issues of fault that dominate traditional libel litigation.¹⁹⁴

The MNC's 1996 adjudication of a dispute between Northwest Airlines, then the largest employer in Minnesota, and CBS-affiliate WCCO-TV provides an excellent example of how a high-profile conflict can be decided on the merits of the complaint rather than become mired in the legal machinations required by traditional libel litigation.¹⁹⁵ Specifically at issue were the promotional spots that WCCO used to advertise a WCCO-TV series.¹⁹⁶ Northwest Airlines claimed that the promotions painted a "confusing but damning impression of Northwest as a company where a culture of intimidation led to serious lapses in maintenance and passenger safety."¹⁹⁷ Northwest claimed that the images of Northwest hangar operations were photographed under the cover of night for the clandestine and shocking effect it would have on the viewer.¹⁹⁸ Northwest also complained of a number of words from a Federal Aviation Administration report that were highlighted during the broadcast,¹⁹⁹ including: "catastrophic failure," "investigation," "careless," and "endangered lives."²⁰⁰

By a wide margin, Northwest Airlines prevailed in its dispute with WCCO-TV.²⁰¹ The local press reported that "the Minnesota News Council delivered a startlingly thorough rebuke to WCCO-TV."²⁰² The MNC upheld the first of the three complaints and concluded that WCCO had painted a "distorted, untruthful" picture of Northwest Airlines.²⁰³ The Council further found that promotions "for news should be held to the

¹⁹⁴ See, e.g., *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510–11 (1991) (discussing the complexities of the actual malice standard as applied to public figures); *Church of Scientology Int'l v. Behar*, 238 F.3d 169, 173–74 (2d Cir. 2001) (holding that Church must prove actual malice since it functions as a public figure).

¹⁹⁵ See, e.g., *Northwest Airlines Complaint*, *supra* note 174.

¹⁹⁶ Prior to this case, the MNC had not considered promotional spots. In this case it addressed the threshold issue of whether to consider the promotions before upholding the complaint. *Id.* The news media commented on the uniqueness of the News Council's evaluation of the WCCO promotions. "As much as the prominence of the combatants, media-watchers are intrigued with the spectacle of someone with abundant resources calling TV news's bluff in the context of promotional gimmickry." Brian Lambert, *NWA-WCCO Feud May Get '60 Minutes' of Fame*, ST. PAUL PIONEER PRESS, Oct. 15, 1996, at 1A.

¹⁹⁷ Lambert, *supra* note 196.

¹⁹⁸ *Northwest Airlines Complaint*, *supra* note 174.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* "The surreal twist in this saga is that WCCO won a coveted Emmy award for the Northwest story one day after it was discredited by the News Council." D.J. Tice, *News Council Judgment on WCCO-TV Must Serve as Reminder to All Media*, ST. PAUL PIONEER PRESS, Oct. 23, 1996, at 6A.

²⁰¹ Brian Lambert, *Northwest Wins Fight with WCCO News Council Assails 'CCO-TV's Report on Airline's Safety Record*, ST. PAUL PIONEER PRESS, Oct. 19, 1996, at 1A [hereinafter *Northwest Wins*]. "The Council upheld the complaint that WCCO painted a distorted, untruthful picture of Northwest Airlines and the men and women who work there." *Id.*

²⁰² *Id.*

²⁰³ *Northwest Airlines Complaint*, *supra* note 174.

same high standard as the news itself.”²⁰⁴ It then found that the promotions themselves conveyed a distorted, untruthful picture of Northwest.²⁰⁵

The substance of the hearing and the decision focused on the truthfulness of the promotions and the story, the use of unreliable sources, and inflammatory rhetoric.²⁰⁶ The written decision of the MNC, its “Determination,” provided substantial detail regarding the offending statements and underlying factual support of the story.²⁰⁷ As reputational experts suggest, these are precisely the issues that potential plaintiffs seek when initiating litigation.²⁰⁸ Northwest vindicated its reputation while avoiding the substantial investment of time and resources required to pursue libel litigation.²⁰⁹

2. News Councils Emphasize Reputational Injury over Monetary Damages

Complainants seeking news council intervention waive any right to financial compensation for their reputational injury. This is not a deterrent to use of news councils, because most potential litigants seek only one thing, outweighing even pecuniary interests: resolution of the damage, real or perceived, to reputation.²¹⁰ “Plaintiffs express a clear interest in a process that is directed straightforwardly to the truth issue, and that is directed toward correction rather than money.”²¹¹

It is impossible to know whether disputes tendered to a news council would have resulted in significant damage awards had the parties sought traditional litigation. However, the prevalence of significant corporations submitting their disputes to news councils suggests that even parties with the means to pursue litigation and a colorable claim prefer a venue focused on reputational injury.²¹² The outcome of a news council hearing provides definitive answers regarding the substance of the media coverage. Winning at the news council brings something more valuable than money to some-

²⁰⁴ *Id.* See also *Northwest Wins*, *supra* note 201.

²⁰⁵ *Northwest Airlines Complaint*, *supra* note 174.

²⁰⁶ *Id.*

²⁰⁷ *Id.* The Council’s deliberation and the resulting Determination did not address any of the traditional “actual malice” standards.

²⁰⁸ See BEZANSON ET AL., *supra* note 28, at 79–82. “[P]laintiff motivations are predominantly reputation-related.” *Id.* at 81.

²⁰⁹ Brian Lambert, *How NWA’s Austin Took on WCCO . . . and Won as ‘60 Minutes’ Prepares to give National Exposure to Northwest Airlines’ News Council Case Against WCCO, the Airlines’ PR Chief Discusses His Strategy*, ST. PAUL PIONEER PRESS, Dec. 7, 1996, at 1F. “The attractiveness of the news council was that it offered a third-party judgment on the merits of [the] claim without the expense and delay of a court trial.” *Id.*

²¹⁰ See BEZANSON ET AL., *supra* note 28 at 168–69.

²¹¹ *Id.* at 169.

²¹² See, e.g., *In re Complaint of Gold’n Plump Co. v. WCCO-TV*, MINN. NEWS COUNCIL DETERMINATION 135 (2003); *Northwest Airlines v. WCCO-TV*, MINN. NEWS COUNCIL DETERMINATION 112 (1996); *Catholic Def. League v. St. Paul Pioneer Press*, MINN. NEWS COUNCIL DETERMINATION 109 (1996).

one wronged by the media: a public restoration of reputation. The *St. Paul Pioneer Press* summed up the cost paid by WCCO for its unfair news story and related promotional spots:

The council's decision carries no legal weight. In fact, complainants must agree to forgo legal action in order for the council to hear their case. But considering the attention the case had received, not the least of which was the presence of CBS correspondent Mike Wallace and a "60 Minutes" camera crew, it was a damning verdict and a professional embarrassment for WCCO.²¹³

3. News Councils Recognize that All Parties Benefit from a Fair and Balanced Process to Resolve Grievances

News councils provide an expeditious mechanism for resolving disputes between media sources and those who suffer harm to reputation.²¹⁴ Both the Washington and Minnesota News Councils consist of twelve journalists and twelve members of the community.²¹⁵ The combination of journalism experts and community members allows the Councils to stand in the shoes of both sides to assess injury and evaluate editorial process. The result is a balanced process that has resulted in complaints upheld in approximately fifty-four percent of the cases brought to the MNC since 1996.²¹⁶

Even journalists admonished by the MNC acknowledge its value to the community. During his closing statement to the Council, award-winning journalist Don Shelby said, "This is a dishonor for me. You've taken the wind out of my sails today."²¹⁷ Shelby told the Council that he had never lied on television in nineteen years.²¹⁸ "This will have a chilling effect on me."²¹⁹ A year later, Shelby told the *Minneapolis Star Tribune* that WCCO

²¹³ Lambert, *supra* note 196.

²¹⁴ Traditional litigation can take years to resolve. The Northwest Airlines-WCCO dispute took mere months to go from Complaint to Hearing and Determination. *Northwest Airlines Complaint*, *supra* note 174.

²¹⁵ For information regarding the membership of the MNC and Washington News Council see Minnesota News Council, About Us, http://www.news-council.org/about_us.html (last visited Feb. 13, 2007); Washington News Council, Council Members, <http://www.wanewscouncil.org/index.html> (last visited Apr. 14, 2007).

²¹⁶ Thirty-one complaints were upheld from 1996 to 2006 while twenty-six complaints were not upheld. See Minnesota News Council, Hearing Index By Date, at http://www.news-council.org/Outcomes/outcomes_bydate.html (last visited Apr. 14, 2007). The MNC has received over a thousand complaints since 1971. Minnesota News Council, Main Determinations Index, at http://www.news-council.org/Outcomes/outcomes_main.html (last visited Apr. 14, 2007).

²¹⁷ Kristin Tillotson, *News Council Sides with NWA in Dispute Over WCCO Report*, STAR TRIB., Oct. 19, 1996, at 1A.

²¹⁸ Lambert, *supra* note 196, at 1A.

²¹⁹ *Id.*

had made mistakes with the story.²²⁰ “The promos . . . inflamed passions and fears. The promos were bad. (The MNC’s explicit condemnation of the promos,) taught us a lesson.”²²¹ Similarly, Minnesota Attorney General Mike Hatch, whose complaint did not qualify for review by the MNC, professes to have no regrets about filing the complaint.²²²

VII. CONCLUSION

Libel law desperately requires reform to provide a meaningful opportunity for redress of reputational injury, and to ensure that press defendants retain their constitutionally guaranteed rights.²²³ The appeal of news councils is obvious when the motivations prompting plaintiffs to sue for libel are taken into consideration. While the timeline for relief through litigation is lengthy, plaintiffs who opt for news councils get instant satisfaction by airing complaints and having the tribunal immediately rule on the merits of the complaint. The defendant gets the benefit of an expedited process that is significantly less expensive and cuts to the merits of the complaint. Additionally, since there is no formal discovery, the sanctity of the newsroom is much more likely to be preserved.

The appeal of news council, either local or national, was best captured by prominent Minnesota editorialist D.J. Tice following the Northwest-WCCO-TV decision:

We in the news media need to be reminded often of the power we wield and of the devastating impact unfair coverage has on people and companies and communities. The public also needs to be reminded, often, to maintain a healthy skepticism about media pronouncements—even when the target of a journalistic fusillade is an outfit everybody loves to resent, like Northwest Airlines. Minnesota’s unique News Council, an independent, voluntary forum for resolving complaints about the media, is a place where such vital reminders can be heard.²²⁴

²²⁰ Brian Lambert, *CCO, Shelby Still Reeling In NWA Wake*, ST. PAUL PIONEER PRESS, Mar. 10, 1997, at 8D.

²²¹ *Id.* (parentheses in original).

²²² See *Politicians Struggle With Family Privacy*, DULUTH NEWS TRIB., July 30, 2006.

²²³ “[I]n view of [the] expensiveness, cumbersomeness, and indirection of the current legal process, fundamental reshaping of the libel system and the constitutional privileges should be considered, and alternative non-judicial processes should be seriously explored.” Bezanson, *supra* note 4, at 169.

²²⁴ Tice, *supra* note 202, at 6A.